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No. 92-506

In The

Supreme Court of the United States

October Term, 1992

CHEVRON TRANSPORT CORPORATION
AND CHEVRON SHIPPING COMPANY,

Petitioners,

versus

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the filing of only a suggestion of a rehearing in banc with a United States court of appeals tolls the ninety day period for filing a petition for writ of certiorari.

2. Whether a general maritime law settlement bar rule precludes a joint tortfeasor from seeking contribution from another joint tortfeasor who has settled with the injured party.

LIST OF PARTIES

The following companies are parties to the proceeding sought to be reviewed. Petitioners, Chevron Transport Corporation, and Chevron Shipping Company, and Respondent, Great Lakes Dredge & Dock Company. The following have ratified the action of Great Lakes Dredge & Dock Company and are intended beneficiaries of its action:

The Travelers Indemnity Company
Certain Underwriters at Lloyds, London
Orion Insurance Company, Ltd.
English & American Insurance Co., Ltd.
Economic Insurance Co., Ltd.
British Traders Insurance Co., Ltd.
Andrew Weir Insurance Co., Ltd.
British Law Insurance Co., Ltd.
Minister Insurance Co., Ltd.
Edinburgh Assurance Co., Ltd.
The Planet Assurance Co., Ltd.
Fine Art & General Insurance Co., Ltd.
Elders Insurance Co., Ltd.
Threadneedle Insurance Co., Ltd.
Sphere-Drake Insurance Co., Ltd.
The British Fire Insurance Co., Ltd.
London & Hull Insurance Co., Ltd.
Cornhill Insurance Co., Ltd.
Sovereign Marine & General Insurance Co., Ltd.
The Tokio Marine & Fire Insurance Co. (U.K.) Ltd.
Tashio Marine & Fire Insurance Co. (U.K.) Ltd.
Scottish Lion Insurance Co., Ltd.
Bishopgate Insurance Limited
New Zealand Insurance Co. (U.K.) Ltd.

LIST OF PARTIES – Continued

Provincial Insurance Co., Ltd.
Liverpool Marine & General Insurance Co., Ltd.
United Standards Insurance Co., Ltd.

The following companies are related to the parties: Chevron, Inc. d/b/a Standard Oil of California; Chevron U.S.A., Blackstone Family Investment Partnership; Blackstone Dredging Partnership; Great Lakes Dredge & Dock Corporation; Great Lakes International, Inc. and the Travelers Insurance Company. Itel Corporation, identified in Chevron's Petition as Intel, Inc., no longer holds any ownership interest in Great Lakes International, Inc. or indirectly in Great Lakes Dredge & Dock Company.

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REFERENCE TO OPINIONS BELOW

The opinions below were omitted in the Petition for Writ of Certiorari:

1. A complete copy of the June 23, 1992 Order by the Eleventh Circuit, denying Chevron's Suggestion of Rehearing In Banc (SA.4).[1]

2. Opinion of July 19, 1985 of the United States District Court for the Middle District of Florida, Jacksonville Division, *Complaint of Chevron Transport Corporation*, 613 F. Supp. 1428 (M.D. Fla. 1985).

3. Opinion of September 27, 1982 of the United States Court of Appeals for the Eleventh Circuit, *Ebanks v. Great Lakes Dredge & Dock Company*, 688 F.2d 716, 1983 A.M.C. 2941 (11th Cir. 1982).

4. The unofficial citation to the Opinion of April 16, 1992 of the Eleventh Circuit, *Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d 1575 (11th Cir. 1992), is 1992 A.M.C. 2311.

5. The unofficial citation to the Order dated April 16, 1990 of the United States District Court for the Middle District of Florida, Jacksonville Division, is 1990 A.M.C. 2247 (M.D. Fla. 1990).

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[1] The Appendix included with the Petition for Writ of Certiorari contains three documents. Great Lakes believes that ready reference to additional documents is necessary to allow the Court to consider fully the issues raised by the Petition. Consequently, a Supplemental Appendix containing additional documents is included with this brief.

6. The unofficial citation to the Opinion of December 1, 1987 of the United States Court of Appeals for the Eleventh Circuit, *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), is 1988 A.M.C. 2278.

JURISDICTION

Jurisdiction, as prescribed by the rules of this Court, has not been properly invoked by the filing of Chevron's Petition for a Writ of Certiorari 158 days after the entry of the judgment for which review is requested. The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 16, 1992. While Chevron timely made a suggestion to the Eleventh Circuit for rehearing in banc pursuant to Rule 35(b), Fed. R. App. P., which was denied by the Eleventh Circuit on June 23, 1992, Chevron never filed a petition for rehearing pursuant to Rule 40, Fed. R. App. P. *See* Sup. Ct. R. 13.4.

STATEMENT OF THE CASE

Great Lakes cannot agree with many of the representations and purported facts set forth in Chevron's Statement of the Case; however, only one such statement bears directly upon this Court's consideration of Chevron's Petition for Writ of Certiorari. Contrary to Chevron's assertions that "a timely petition for rehearing *en banc* . . . was denied . . . ," it never filed a petition for rehearing of the Eleventh Circuit's April 16, 1992 judgment. Rather, Chevron only made a suggestion for rehearing in banc pursuant to Rule 35(b), Fed. R. App. P.

SUMMARY OF THE ARGUMENT

I. ISSUE 1

Chevron's Petition for Writ of Certiorari is jurisdictionally out of time. The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 16, 1992. While Chevron timely made a suggestion for rehearing in banc pursuant to Rule 35(b), Fed. R. App. P., which was denied on June 23, 1992, Chevron never filed a petition for rehearing. As the filing of Chevron's Suggestion for Rehearing In Banc alone did not toll the ninety day period prescribed for filing a petition for writ of certiorari, *see* Sup. Ct. R. 13.4, the filing on September 21, 1992 of the Petition for Writ of Certiorari was jurisdictionally out of time.

II. ISSUE 2

Great Lakes contends that no true conflict presently exists among the circuits concerning contribution from a settling maritime tortfeasor. While there are three generally recognized, potential methods for addressing the issue, not all are in conflict with one another. Rather, when compared with the Supreme Court principles underlying maritime contribution, it becomes clear that the first and third methods, as identified in Chevron's writ petition, conflict only with the second approach and not with one another. Since no United States court of appeals has adopted the second method exclusively, there presently is no true conflict among the circuits.

ARGUMENT

There are two reasons for denying Chevron's Petition for Writ of Certiorari. First, Chevron's Petition is jurisdictionally out of time. Secondly, while there is the potential for conflict among the circuits concerning contribution against a settling maritime joint tortfeasor, there presently is no true conflict concerning this issue.

I. PETITION IS JURISDICTIONALLY OUT OF TIME

Chevron's Petition for Writ of Certiorari is jurisdictionally out of time. Rule 13.4 of the Rules of the Supreme Court of the United States provides in part:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. . . . However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. *A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.* (emphasis added).

In this case, the Eleventh Circuit rendered judgment on April 16, 1992, and Chevron, after obtaining an extension of time, made a suggestion for rehearing in banc on May 13, 1992, which was denied by the Eleventh Circuit on June 23, 1992. A petition for rehearing was never filed by Chevron. Since the filing of a suggestion for rehearing in banc alone does not toll the ninety day period to file a

writ of certiorari, Chevron's filing of the petition for writ of certiorari on September 21, 1992, 158 days after entry of judgment, was jurisdictionally out of time.

In its Petition for Writ of Certiorari, Chevron effectively represents that it filed both a suggestion for rehearing in banc and a petition for rehearing. Nevertheless, the court of appeals' record reveals that Chevron never filed a petition for rehearing, either (1) as a separate document, or (2) combined with its Suggestion for Rehearing In Banc. Rather, the record reflects that Chevron filed a suggestion for rehearing in banc and a suggestion for rehearing in banc only.

A review of Chevron's Suggestion for Rehearing In Banc (SA.5) reveals that a petition for rehearing was not combined with Chevron's Suggestion. In fact, the language "petition for rehearing" never appears in Chevron's Suggestion. Rather, all references are to a suggestion for rehearing in banc. The following quotes in Chevron's Suggestion are illustrative:

> 1. The cover page is entitled simply "CHEVRON'S SUGGESTION FOR REHEARING *EN BANC*." (SA.5p. 1b)
>
> 2. The "STATEMENT REGARDING EN BANC CONSIDERATION" provides in part "that consideration by the full court is necessary. . . . " (SA.5p. 4b)
>
> 3. The issue is stated as "EN BANC CONSIDERATION IS WARRANTED BECAUSE. . . . " (SA.5p. 7b)
>
> 4. The last sentence of the statement of the case prays "Chevron seeks en banc review of the panel's decision." (SA.5p. 11b)

5. The first sentence of the argument emphasizes "The panel's disposition of the issue before it invokes every concern that this Circuit has identified as warranting its *en banc* review." (SA.5p. 12b)

6. The last sentence of the argument declares "It [the panel's decision] should therefore be reconsidered by the Court *en banc*." (SA.5p. 23b)

7. The conclusion consists of one sentence which provides "For the foregoing reasons, Chevron respectfully requests *en banc* rehearing of the panel's decision." (SA.5p. 23b)

It also is clear from the tone and tenor of the Suggestion for Rehearing In Banc that Chevron neither contemplated nor sought a panel rehearing. Chevron's Suggestion did not even attempt, as required by Rule 40, Fed. R. App. P., to direct the panel to points of law or fact which it had overlooked. Indeed, none of the argument contained in the Suggestion was directed to the panel. To the contrary, rather than appealing to the panel to reconsider its decision, Chevron leveled a succession of charges at the panel and its decision, characterizing the decision as "senseless" (SA.5p 7b) and accusing the panel of having "abandoned" the circuit's established law (SA.5p. 12b), having "cavalierly pushed aside" authorities (SA.5p. 16b), and having effected a "radical digression from policies" and "basic precepts" of, among other things, "fairness." (SA.5p. 12b). The panel was further charged with having been guilty of "acute insensitivity" and being detached from the practical ramifications of its decision, all the while at the same time refusing to acknowledge reality. (SA.5p. 17b). All in all, the tone and tenor of Chevron's argument was hardly the metal from

which an appeal to the panel would have been hammered.

That a petition for rehearing was never filed is demonstrated further by Chevron's own characterizations in other documents of its Suggestion for Rehearing In Banc. On May 13, 1992, Chevron submitted a letter of supplemental authority to the Eleventh Circuit (SA.6), stating "Please note that this letter relates to Chevron's Suggestion of Rehearing *En Banc* filed on May 14, 1992, and should be distributed to all Judges of the Circuit." The May 13th letter further suggests "[T]he language . . . [of the case submitted as supplemental authority] supports Chevron's position throughout its Suggestion of Rehearing *en banc*. . . . " Likewise, in its Motion for Stay of Mandate, date June 29, 1992 (SA.7), Chevron noted:

> "1. CHEVRON filed its Suggestion of Rehearing *En Banc* from this Court's opinion on May 14, 1992.
>
> 2. In an Order, dated June 23, 1992, this Court denied CHEVRON's Suggestion of Rehearing *En Banc.*"

The first time Chevron's Suggestion for Rehearing In Banc is referred to by any language other than "suggestion for rehearing in banc" is Chevron's Motion for Reconsideration of the Motion for Stay, dated July 23, 1992 (SA.8). It must be emphasized, however, that that motion also is the first time Chevron mentions Rule 13.4 of the Rules of the Supreme Court of the United States.

Similarly, the June 23 Order (SA.4) itself does not necessarily recite that Chevron filed a petition for rehearing. Rather, the standard form on which the Order was issued consisted of three separate paragraphs, with a

judge indicating his or her reasons for decision by placing an "X" next to the appropriate paragraph. There, however, was no paragraph relating to the situation where, as here, no petition for rehearing had been filed and the suggestion for rehearing in banc had been denied with no member of the panel or other judge in regular service requesting a rehearing.

Despite having failed to file a petition for rehearing, Chevron, nonetheless, contends that its Suggestion for Rehearing In Banc has the "operational effect" of a petition for rehearing under the Eleventh Circuit's local rules.[2] Chevron, however, cannot supplant the Rules of the Supreme Court of the United States by bootstrapping the local rules and standard forms of an inferior federal court. The Rules of the Supreme Court are superior to the local rules of the lower courts, and should operate uniformly without the necessity for reference to, and construction of, local court rules. Rule 13.4 of the Rules of the Supreme Court clearly and expressly provides that a suggestion for rehearing in banc "is not a petition for rehearing within the meaning of this Rule." The purpose of the 1990 amendment was to establish a uniform, bright line rule, which clarified the previous confusion as to whether a suggestion for rehearing in banc tolled the 90 day period for filing writ petitions. Boskey & Gressman, *The Supreme Court's New Rules for The Nineties,* 110 S. Ct.

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[2] Chevron's contentions were not mentioned in its Petition for Writ of Certiorari. Rather, they were noted in a letter dated September 17, 1992 from counsel for Chevron to counsel for Great Lakes. (SA.9) Chevron's writ petition was filed on September 21, 1992.

(Interim Edition) *749, 766* (1989). If Chevron's contention is accepted, the pre-1990 confusion would reappear, since Rule 13.4 would have no effect in cases arising from the Eleventh Circuit or any other United States court of appeals with similar local rules or standard forms. This would soon destroy uniformity of application and result in this Court's having to analyze and construe the different local rules of the thirteen circuits to determine the timeliness of writ petitions.

Great Lakes submits that the matter should rest with the uniform application of this Court's clearly expressed rule. But beyond this, the Eleventh Circuit local rules neither state nor imply that a suggestion for rehearing in banc shall have the operative effect of a petition for rehearing. While Eleventh Circuit local Rule 35-6 does say that "A suggestion of rehearing en banc will . . . be treated as a petition for rehearing . . . ," Eleventh Circuit Rule 35-8 and the Circuit's Internal Operating Procedures ("I.O.P.") dispel any notion that Eleventh Circuit Rule 35-6 converts suggestions for rehearing in banc into petitions for rehearing.[3] Eleventh Circuit Rule 35-8 permits suggestions of rehearing in banc to be combined with petitions for rehearing, and the I.O.P. makes clear that petitions for rehearing are still contemplated and may be either combined with a suggestion of rehearing in banc or filed separately.[4]

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[3] Rules 35-6 and 35-8 and the relevant I.O.P. of the Eleventh Circuit are attached (SA.10).

[4] The I.O.P. provides, in part:

1. *Time and Form.* A suggestion for rehearing en banc, whether or not combined with a petition for

Finally, Chevron asserts that a Supreme Court docket clerk advised that the Eleventh Circuit's rules and standard form order have the operative effect of a petition for rehearing. Chevron, however, could not have reasonably relied on any such statement. Rule 7, Sup. Ct. R., prohibits employees of the Clerk's office from rendering legal advice. The Justices of the Court ultimately determine the proper effect of the Rules, not the Clerk's office.

II. NO TRUE CONFLICT AMONG CIRCUITS

There presently exists no true conflict among the circuits concerning contribution against a settling maritime tortfeasor and no certainty that one will ever crystalize. While there are three generally recognized, potential methods for addressing the issue, not all are in conflict with one another. The first (recognized by the court below) and third methods identified and listed in Chevron's Petition conflict only with the second potential approach and not with one another. The first and third methods are in harmony with established maritime law principles as announced by this Court while the second is not. Therefore, since no circuit has adopted the second approach exclusively, no true conflict presently exisis among the circuits concerning contribution against a settling maritime tortfeasor.

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rehearing is timely only if received by the clerk within 21 days of entry of judgment.

2. *Length.* A suggestion of rehearing in banc, whether or not filed with a petition for rehearing, is limited to 15 pages. . . .

Great Lakes begins, as did the Eleventh Circuit below, with the applicable Supreme Court precedent. Contrary to Chevron's contention, *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 109-115 (1974), and *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397, 401-08 (1975), provide conclusive guidance in determining whether contribution is permitted from a settling maritime tortfeasor.

In *Cooper Stevedoring*, this Court reaffirmed that, as a matter of general maritime law, a joint tortfeasor was entitled to contribution against another tortfeasor. In announcing this decision, the Court identified the principles underlying maritime contribution as (1) a more equal distribution of justice, and (2) safety (deterrence).

> Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principal of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. . . . Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interest of safety dictate that where two parties 'are both in fault, they should bear the damage equally, to make them more careful.' The Alabama, *supra*, 92 U.S. [695] at 697 [(1876)] and a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrong doers to bear the entire loss, though the other may have been equally or

> more to blame. See The Max Morris, *supra*, 137 U.S. [1] at 14, 11 S. Ct. [29] at 32 [(1890)].

417 U.S. at 110-11.

In *United States v. Reliable Transfer Company, Inc.*, 421 U.S. 397 (1975), the second of the *Cooper Stevedoring* underpinnings – the quest for a more equal distribution of justice – was the foundation of the analysis that accompanied the rejection of equally divided damages in favor a rule which apportions damages in relationship to a person's degree of causative fault. *Id.* at 401-11. An "ancient form of rough justice" with its propensity to produce "palpable unfair results" was restructured with a view toward enhancing the fundamental fairness of the final judicial result. *Id.* at 403-07.

The defendant in *Reliable Transfer* had argued that the apportionment of fault doctrine would frustrate settlements. In rejecting this contention, this Court observed:

> [T]he [defendant's] argument is hardly persuasive. For if the fault of the two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that . . . a court [will] . . . absolve it of all liability. . . . But even if this argument were more persuasive than it is, it could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements. . . .

Id. at 408.

The longstanding commitment of the admiralty courts to comparative fault and to promoting safety at sea and other navigable waters makes the general maritime

law unique. Nonmarine cases and commentary relating to contribution and settlement, therefore, may or may not be persuasive authority in a maritime case, depending upon the public policy considerations involved. *See, e.g., In Re Oil and Gas Litigation,* 967 F.2d 489, 494 n.3 (11th Cir. 1992) (general maritime law rules concerning contribution and settlement inapplicable in class action).

Being guided by the maritime law principles underlying *Cooper Stevedoring* and *Reliable Transfer,* it becomes clear that there presently exists no conflict among the circuits in cases involving settling maritime tortfeasors. As noted in Chevron's Petition for Writ of Certiorari, the three generally accepted methods for dealing with contribution against settling tortfeasor are:

> (1) Awarding the plaintiff his full damages against the non-settling tortfeasor (less the sum he received in settlement) and allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his equitable share of the plaintiff's claim;
>
> (2) Awarding plaintiff his full damages in the same manner as in approach one *but* imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in 'good faith,' and
>
> (3) Reducing the claim of the plaintiff to the pro-rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.

Chevron's Petition for Writ of Certiorari at 9-10.

The principles underlying methods one and three are consistent with one another. The principle of a more equal distribution of justice is effectuated by methods one and three since neither method would result in a non-settling tortfeasor's paying more than his adjudicated proportionate share of a judgment or settlement. Likewise, the principle of safety is promoted by both methods. No principle is more firmly entrenched in the maritime law than that comparative fault precepts promote safety by focusing the most deterrent effect on the party most responsible for the harm. *See, e.g., United States v. Reliable Transfer Co.*, 421 U.S. 397, 405 n. 11 (1975); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 110-11 (1974); *The Alabama*, 92 U.S. 695, 697 (1876).

Chevron argues that the first and third methods conflict because the third method allegedly promotes settlements more than the first approach. Nevertheless, properly analyzed the third approach does not promote settlements any more than does the first approach. The same protection which a settling tortfeasor obtains under the third approach – the buying of his peace – also is available under the first approach. It is only a matter of appropriately conditioning the terms of the settlement documents.[5]

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[5] By way of example, the Supplementary Appendix includes an extract from a release actually utilized in concluding the settlement by two alleged joint tortfeasors of a case governed by the general maritime law while permitting the claimants to reserve and retain their rights against at least one non-settling joint tortfeasor. (SA.11).

Additionally, under the third approach, the plaintiff bears the burden of a "bad settlement." A plaintiff stands to receive less than he would by going to trial, if the amount of the settlement is less than or equal to the amount of damages attributable to the settling defendant's adjudicated proportion of fault. *See* Comments to 12 U.L.A. § 6, at 57 (1992 Supp.).

Chevron also implies that the first and third approaches are inconsistent because the third method precludes a non-settling tortfeasor from seeking contribution against a settling tortfeasor. Under the third method, however, a non-settling tortfeasor receives a credit against the plaintiff for that percentage of the judgment corresponding to the settling defendant's degree of fault. Contribution, therefore, is not necessary because this credit protects the non-settling defendant from paying more than its proportionate share of the judgment.

By sharp contrast to approaches one and three, approach two conflicts not only with the principles underlying maritime contribution but with the other two approaches. Method two clearly violates the principle of "a more equal distribution of justice." Under the second method, a non-settling tortfeasor could be forced to bear a substantially greater amount of a loss, even though it was less culpable, simply by virtue of the plaintiff's decision to settle with the other tortfeasor. This type of result was among the reasons why the common law rule of no contribution was objectionable and was rejected by this Court in *Cooper Stevedoring*. As noted by the United States Court of Appeals for the Seventh Circuit in *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985):

> [The second approach] would be contrary to the spirit of contribution, since it would allow guiltier defendants to get off cheaply by settling first. The consequences of the race to settle to the losers of the race are among the reasons for finding the old common law rule of no contribution objectionable.

The second method also would frustrate the principle of safety (deterrence). If maritime defendants can avoid their true measure of liability by entering into quick, partial settlements, the deterrent effect of comparative fault will be negated. If, however, maritime tortfeasors must respond for their degree of fault, they would be more careful, resulting in fewer injuries. *See, e.g., Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER,* 957 F.2d 1575, 1581-82 (11th Cir. 1992).

Chevron maintains that the second approach promotes settlements more than the first and third approaches. While Chevron's position may have been persuasive in 1955, experience and logic have demonstrated otherwise.

The experience of the drafters of the uniform laws is instructive. Originally, the Uniform Contribution Among Tortfeasors Act allowed contribution against a settling tortfeasor. The Act, however, was amended in 1955, precluding contribution. 12 U.L.A. § 4(b), at 98 (1975). The 1955 amendment resulted in large part from the drafter's belief that the second method would promote settlements. *Id.* at 99-100. Nevertheless, in 1977, the drafters of the uniform laws changed their opinions, adopting the third approach, Uniform Comparative Fault Act, 12 U.L.A § 6, at 56 (1992 Supp.), in part because experience had

demonstrated that the second approach did not promote settlements. The comments to the 1977 Act provide in part: "While . . . [the second approach] theoretically encourages settlement, it may be unfair to the other defendants and if the good-faith requirement is conscientiously enforced, settlement may be discouraged." *Id.* at 57. Any reference to the 1977 Act is conspicuously absent from Chevron's Petition for Writ of Certiorari, as well as from the recent court of appeals decisions in *In Re Oil Spill by the AMOCO CADIZ*, 954 F.2d 1292, 1314-18 (7th Cir. 1992), and *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 835-36 (5th Cir. 1992).

Additionally, logic demonstrates that the second approach promotes quick, partial, unjust settlements, rather than compromise of the entire case. Once a plaintiff settles with one defendant, the claimant no longer has any incentive to settle with the non-settling defendant, since the plaintiff need only to establish one percent of fault on the part of the non-settling co-defendant to recover the entire judgment. This lack of incentive will delay the ultimate disposition of law suits, contrary to the goal of full and complete settlements. *Cf. Reliable Transfer*, 421 U.S. at 408 ("[I]f the fault of the two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that . . . a court [will] . . . absolve it of all liability. . . . ").

Even if the first and third methods did have a slight deterrent effect on full and complete settlements, this Court, contrary to Chevron's assertions, has expressed a preference for the principle of a more equal distribution

of justice. "[The argument against comparative fault] asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation." *Reliable Transfer,* 421 U.S. at 408, *quoted in Great Lakes,* 957 F.2d at 1582.

A review of the maritime decisions by the United States courts of appeals reveals that no circuit has adopted the second method exclusively. Rather, the circuits have adopted the first or third approach exclusively or combinations of the three approaches. *Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER,* 957 F.2d 1575, 1581-83 (11th Cir. 1992) (adopting the first approach); *In Re Oil Spill by the AMOCO CADIZ,* 954 F.2d 1279, 1314-18 (7th Cir. 1992) (rejecting the third approach but not deciding between the first and second approaches); *Hardy v. Gulf Oil Corp.,* 949 F.2d 826, 835-36 (5th Cir. 1992) (rejecting the first approach but not taking a position between the second and third approaches); *Associated Elec. Coop., Inc. v. Mid-America Transp. Co.,* 931 F.2d 1266, 1271 (8th Cir. 1991) (adopting the third approach); *Miller v. Christopher,* 887 F.2d 902, 903-07 (9th Cir. 1989) (rejecting the first approach but not deciding between the second and third approaches). *Stanley v. Bertram-Trojan, Inc.,* 781 F. Supp. 218, 221-26 (S.D. N.Y. 1991), cited by Chevron as a second-approach case, actually adopted the second or third approaches, depending upon which method is most favorable to the non-settling defendant.

There presently exists no true conflict among the circuits concerning contribution against a settling maritime tortfeasor. If a United States court of appeals ever adopts just the second approach in a maritime case, this Court's review then would be warranted because a true

conflict then would exist not only among the circuits, but also with the Supreme Court principles underlying maritime contribution. This, however, is neither the case nor the time to resolve that hypothetical conflict.

CONCLUSION

There are two reasons why the petition for Writ of Certiorari should be denied. First, Chevron's Petition is jurisdictionally out of time. Secondly, while there is a potential for conflict among the circuits concerning contribution against a settling maritime tortfeasor, there presently is no true conflict concerning this issue. Accordingly, Great Lakes respectfully requests this Court to deny Chevron's Petition for Writ of Certiorari.

Respectfully submitted,

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4. SA.7. . . . . Motion for Stay of Mandate
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SA.4

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 23 1992
MIGUEL J. CORTEZ
CLERK

No. 90-3466

GREAT LAKES DREDGE & DOCK COMPANY,

Plaintiff-Appellant,

versus

TANKER ROBERT WATT MILLER,

Defendant-Appellee.

Complaint of CHEVRON TRANSPORT CORPORATION, as owner of the S/S ROBERT WATT MILLER, in an action for exoneration from or limitation of liability,

Plaintiff.

GREAT LAKES DREDGE & DOCK CO., a corporation,

Plaintiff-Appellant,

versus

CHEVRON SHIPPING COMPANY and ITALIA SOCIETE PER AZ DI NAV.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 16, 1992, 11th Cir., 19__, ____ F.2d ____).

BEFORE COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s)) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request on one of the members of the Court and a majority of the circuit judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

2a

SA.5

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-3466

On Appeal From The United States District Court
For the Middle District of Florida,
Jacksonville Division

GREAT LAKES DREDGE & DOCK COMPANY,

Plaintiff/Appellant,

- versus -

CHEVRON SHIPPING COMPANY, et al.,

Defendants/Appellees.

CHEVRON'S SUGGESTION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE

The undersigned, counsel of record for the appellee, certifies in accordance with 11th Cir. R. 28-2(b) that the following contains a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party.

Boghraty, Babak	Attorney for Appellee
Bolz, Henry H., III	Attorney for Appellee
Chevron Corporation	Corporate parent of Chevron Shipping Co. and Chevron Transport Corporation
Chevron Shipping Company	Appellee
Chevron Transport Corporation	Appellee
Great Lakes Dredge & Dock Company	Appellant
Great Lakes International, Inc.	Corporate parent of Great Lakes Dredge & Dock Company
Faris, Ellis, Cutrone & Gilmore	Attorneys for Appellant
Faris, Warren M.	Attorney for Appellant
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Futrell, John M.	Attorney for Appellant
Itel Corporation	Corporate parent of Great Lakes International, Inc.
Kelley Drye & Warren	Attorneys for Appellee
Kops, John M.	Attorney for Appellant
Melton, Howell W., Honorable	Trial judge in earlier proceeding
Stanton, Courtney Wilder	Attorney for Appellant
Sullivan & Vlcek	Attorneys for Appellee
Thomas, Daniel H., Honorable	Trial judge, sitting by designation in earlier proceeding
Travelers Indemnity Company	Appellant's primary protection-and-indemnity insurer
Underwriters at Lloyd's and Insurance Companies, severally subscribing to Policy No. 36/103	Appellant's excess protection-and-indemnity insurers
Villareal, Dewey, R., Jr.	Attorney below for Appellant
Vlcek, Alan B.	Attorney for Appellee

CORPORATE DISCLOSURE STATEMENT

Chevron Corporation

STATEMENT REGARDING EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedent of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: ***Self v. Great Lakes Dredge & Dock Co.,*** 832 F.2d 1540 (11th Cir. 1981)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one question of exceptional importance:

> THE PANEL OPINION EXPLICITLY REJECTS THE SETTLEMENT BAR RULE, WHICH WAS ENUNCIATED AS THE LAW OF THIS CIRCUIT IN ***SELF,*** AND UNANIMOUSLY RECOGNIZED AS SUCH BY OTHER COURTS AND COMMENTATORS – IN FAVOR OF A SENSELESS AND MUCH-CRITICIZED RULE WHICH UNDULY IMPEDES SETTLEMENTS WITH THE INJURED PLAINTIFF AND WASTES JUDICIAL RESOURCES BY ALLOWING CONTRIBUTION BY AND AGAINST A SETTLING TORTFEASOR.

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STATEMENT OF THE ISSUE

EN BANC CONSIDERATION IS WARRANTED BECAUSE THE PANEL OPINION EXPLICITLY REJECTS THE SETTLEMENT BAR RULE, WHICH WAS ENUNCIATED AS THE LAW OF THIS CIRCUIT IN ***SELF,*** AND UNANIMOUSLY RECOGNIZED AS SUCH BY OTHER COURTS AND COMMENTATORS – IN FAVOR OF A SENSELESS AND MUCH-CRITICIZED RULE WHICH UNDULY IMPEDES SETTLEMENTS WITH THE INJURED PLAINTIFF AND WASTES JUDICIAL RESOURCES BY ALLOWING CONTRIBUTION BY AND AGAINST A SETTLING TORTFEASOR.

STATEMENT OF FACTS, COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On February 5, 1975, the tanker, the M/V "ROBERT WATT MILLER," owned by Chevron Transport Corp. and managed by Chevron Shipping Corp. (collectively "Chevron"), collided with the dredge "ALASKA" owned by Great Lakes Dredge & Dock Co. ("Great Lakes") in the St. Johns River, in Jacksonville, Florida. Eight crew members aboard the "ALASKA" were injured, and two others were killed.

The personal injury and death claimants filed separate actions against Great Lakes under the Jones Act and general maritime law. They also sued Chevron. Great Lakes in turn filed third-party complaints against Chevron for indemnity and/or contribution for any sums which Great Lakes might become liable to pay on account of the personal injury and death claims.

Chevron settled all of the personal injury and death claims brought against it for the total sum of $707,800, the last of such settlements being entered into on May 29, 1979. Chevron obtained full and complete releases from each of the claimants for any injuries, damages and/or claims sustained by them arising out of the collision. Each of the settlements was approved by the district court after notice to Great Lakes and discharged Chevron from any other or further liability arising out of the collision.

Great Lakes declined to settle the claims against it, and those claims were tried to a jury in Jacksonville, Florida, on June 1, 1979. Prior to the trial, the claimants amended their complaints against Great Lakes to add claims for punitive damages for various safety violations. The court severed the third-party actions against Chevron for trial at a later date. As a result, Chevron was not a party to the trial.

The claims were submitted to the jury under the theory of ***Leger v. Drilling Well Control, Inc.***, 592 F.2d 1246 (5th Cir. 1979). The jury found that Great Lakes had been negligent; however, its negligence was not a proximate cause of the claimants' losses. The jury found Chevron 100% at fault in the collision. The seamen appealed, and for the reasons set forth in ***Ebanks v. Great Lakes***

Dredging & Dock Co., 688 F.2d 716 (11th Cir. 1982), this Court reversed, and remanded the case for a new trial. On remand, the trial court consolidated for non-jury trial all pending actions, including Great Lakes' third-party claims for indemnity and/or contribution against Chevron.

The second trial began January 28, 1985. By that time, Great Lakes had settled with all the claimants, except Vivian Marie Self, the personal representative of the estate of Danny Joe Self. In addition, the district court had granted Chevron a partial summary judgment on Great Lakes' indemnity claim on the ground that, there being no contractual or other special relationship between Great Lakes and Chevron, Great Lakes was not entitled to indemnity as a matter of law.

At the second trial, Self's claims against Great Lakes were tried as well as liability issues between Great Lakes and Chevron. Self argued that Great Lakes recklessly failed to comply with numerous safety regulations, entitling her to compensatory and punitive damages. Self and Chevron contended that Great Lakes improperly positioned the "ALASKA" and its attendant barge in the channel. Great Lakes alleged that Chevron negligently allowed the M/V "ROBERT WATT MILLER" to proceed through the channel with insufficient information about the location of the dredge and barge. Evidence on these and other claims were presented at trial.

Following the presentation of the evidence, the trial court concluded Great Lakes was 30% responsible and Chevron was 70% responsible for the ***collision.*** It also found Self's total damages to be $661,354.00. Relying on

Leger, 592 F.2d 1246, the court held that Self, who had already settled with Chevron for $315,000, was only entitled to recover a 30% *pro rata* share of her total damages from Great Lakes. The court awarded Self a judgment of $198,406.20 against Great Lakes.

After the entry of the judgment, all three parties – Self, Chevron and Great Lakes – appealed. This Court affirmed in part, reversed in part, and remanded in *Self v. Great Lakes Dredge & Dock Co.,* 832 F.2d 1540 (11th Cir. 1987). Specifically, the Court affirmed, *inter alia,* the partial summary judgment granted to Chevron on Great Lakes' indemnity claim but reversed the trial court's award of damages to Self, rejecting the court's application of *Leger* as inconsistent with the principles of joint and several liability subsequently discussed by the Supreme Court in *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979). The Court held that Self could recover the full amount of her damages from Great Lakes on a *pro tanto* basis; that is, she could recover the total amount of her damages from Great Lakes, regardless of its percentage of fault in causing the collision, with an appropriate dollar-for-dollar set-off for the settlement sums paid by Chevron. This Court also stated that Chevron's court-approved settlements barred Great Lakes' claims for contribution under the principles of *Luke v. Signal Oil & Gas Co.,* 523 F.2d 1190 (5th Cir. 1979) which were subsequently incorporated in the pro rata liability scheme adopted in *Leger.* The case was remanded for a new trial on damages, including Self's claims for punitive damages.

A third trial on Self's damages was never held. After this Court rendered its opinion in *Self*, Great Lakes settled with Vivian Marie Self for $2,050,000 on April 25, 1988. The settlement brought the total amount of money paid by Great Lakes in settlement of the claims of its crew members to $2,993,199, the amount with respect to which Great Lakes seeks contribution from Chevron. None of the death and personal injury claims against Great Lakes thus were ever adjudicated; rather, they were all settled without a judicial determination of damages.

The district court subsequently entered summary judgment in favor of Chevron on Great Lakes' claims for contribution. Relying on *Self's* adoption of the *pro tanto*/ settlement bar contribution rule, the court held that Chevron's settlements barred the contribution claims of Great Lakes. The court further held that even if Great Lakes was entitled to recover contribution from Chevron, determining the amount of such an award, as a practical matter, would be an impossible task as both parties had settled voluntarily with the claimants. Great Lakes appealed.

On April 16, 1992, a panel of this court reversed, rejecting as dicta that portion of *Self* adopting the settlement bar rule. The panel remanded, leaving to the district court the task of determining again whether the parties' proportionate liability for the claimant's damages, as well as the quantum of those damages, can be determined after 17 years of litigation. Chevron seeks en banc review of the panel's decision.

ARGUMENT

The panel's disposition of the issue before it invokes every concern that this Circuit has identified as warranting its ***en banc*** review. The panel abandoned the established law of this Circuit – which was in line with the overwhelming majority of States – in favor of a rule which no other circuit follows and which has been the subject of intense criticism by courts and commentators alike. Left standing, the precedent created by the panel would represent a radical digression by this Circuit from the policies underlying general maritime law, and basic precepts of fairness, practicality and judicial economy.

The panel held that a tortfeasor who settles with the plaintiff buys no protection from further litigation and liability for the same damage in a subsequent action for contribution, ***Slip Op.***, at 2120. It also held that a tortfeasor who settles with the plaintiff is not bound by the finality of his settlement and may sue another settling tortfeasor on the sole premise that the amount he paid in settlement ***might*** have exceeded his proportionate share of the damages. ***Slip Op.*** at 2122. The startling breadth of this holding becomes apparent in light of its factual underpinnings: Great Lakes and Chevron have both settled with the plaintiffs before a valid assessment of the quantum of plaintiffs' damages or the defendants' percentages of fault. Thus, after seventeen years of litigation which included two trials and two appeals, the panel sent the parties back to the dawn of this controversy to reenact ten personal injury and death trials and determine ***if*** either one of the tortfeasors paid more in settlement than it would have paid had both parties gone to trial. ***Slip Op.*** 2122.

To permit this result, the panel rejected what has been the established rule in this jurisdiction since ***Leger v. Drilling Well Control, Inc.***, 592 F.2d 1246 (5th Cir. 1979): that a settlement with the plaintiff immunizes the settling tortfeasor from further liability for contribution. ***Id.*** at 1248. The settlement bar rule explicit in ***Leger*** was later reaffirmed by this Circuit in ***Self v. Great Lakes Dredge & Dock Co.***, 832 F.2d 1540 (11th Cir. 1981), a prior appeal in this very case.

Self adopted as its own the rule followed by most jurisdictions in this country: a tortfeasor who refuses to settle and instead goes to trial against the plaintiff receives a dollar-for-dollar credit for any amount that the plaintiff received from other tortfeasors in settlement, and must pay the balance of plaintiff's damages as determined at trial without a right of contribution against the settling tortfeasor. ***Self's*** prohibition of contribution against settling tortfeasors was unequivocal:

> We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damage than it caused. Nor do we overlook the rule that there may be joint contribution in an admiralty case and that ***in the absence of a settlement,*** the amount of contribution turns on the percentage of fault of each tortfeasor. ***Leger*** upheld that 'settling defendants are relieved of any further liability to the Plaintiff.' ***It is obvious that the rule announced in Luke [and Leger] overrides the right of contribution.***

Self, 832 F.2d at 1547 (emphasis added, footnote and citations omitted, quotation from ***Leger,*** 592 F.2d at 1248).

The logic of barring contribution against a settling tortfeasor is clear: a tortfeasor who settles seeks to avoid the cost of additional litigation and the risk of a potentially higher exposure at trial. *See, Leger,* 592 F.2d at 1250. Exposing a settling tortfeasor to further litigation and liability would render settlement fruitless – removing the very benefits that a settling tortfeasor would hope to derive from his payment to the plaintiff. *See, Miller,* 887 F.2d at 907. A system which so strongly discourages settlement effectively denies the injured tort victim of timely relief for his injuries and unnecessarily prolongs the dispute at great cost to society.

The Ninth Circuit in *Miller v. Christopher,* 887 F.2d 902 (9th Cir. 1989) followed *Self* and adopted the settlement bar rule after noting the devastating effect of contribution on settlements:

> The effect of [allowing contribution] has been to discourage settlements in joint tort cases, by making it ***impossible*** for one tortfeasor alone to take a release and close the file. . . . No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. Some reports go so far to say that allowing contribution has made independent settlements impossible. Many of the complaints come from plaintiff's attorneys, who say they can no longer settle case with one tortfeasor . . . It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to

> prevent discrimination by plaintiffs, or collusion in the suit.

Id. at 907 (emphasis added), *quoting,* 12 U.L.A. 99-100.[1]

The Seventh Circuit in *In the Matter of Oil Spill By the Amoco Cadiz,* 954 F.2d 1279 (7th Cir. 1992) also commented on the inefficiency and futility of allowing post-settlement contribution:

> *Contribution*: Instead of the rush to settle under the no-contribution rule there is competition not to settle – for a settling defendant pays cash with certainty but does not buy peace, and may be called on to pay a full share if the plaintiff wins at trial, while a party going to trial may be able to obtain contribution from another defendant . . . Costs of administering the legal system rise, for courts must apportion damages. The costs of doing this may be steep if the parties cannot agree on who should be responsible . . .
>
> Take this case as an example. Thirteen years have passed since the [accident], almost two of them spent in trials on liability and damages. The record still does not permit a confident assessment of ABS's proportionate fault (if any) . . . We are confident that this case would at last come to an end, but may be not in this century. At all events, why should the judicial system invest so heavily in adjusting accounts

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[1] The quoted passage was from the Commissioner's Comments to the 1955 version of the Uniform Contribution Among Tortfeasors' Act (UCATA), which imposed the settlement bar rule and replaced the 1939 version of the UCATA which permitted post-settlement contribution.

> among wrongdoers? Neither justification for the tort system – compensation of victims and the creation of incentives to take care – would be served by this collateral litigation. Conducting such cases would detract from the time courts have available to handle new claims by deserving persons.

Id. at 1317-18. These comments are not based on mere speculation or conjecture, but the real experiences of states that attempted to implement the original version of the Uniform Contribution Among Tortfeasors Act ("UCATA"), drafted in 1939, which permitted contribution against settling tortfeasors. 12 U.L.A. 99. Those states found this approach extremely discouraging to settlements. *See, Id.* at 99-100 (1975); *Miller,* 887 F.2d at 905. This led the drafters of the UCATA to abandon that approach and adopt the settlement bar rule in the 1955 version of the Act. The overwhelming majority of states have followed the 1955 version of the UCATA and bar contribution against settling tortfeasors.

The panel, however, cavalierly brushed aside these authorities and refused to acknowledge the reality that allowing contribution will greatly impede settlements:

> The injured party is assured of full compensation for his damage (less a deduction for any contributory negligence) and is unaffected by any subsequent action among the joint tortfeasors for contribution . . . Chevron argues that allowing contribution will discourage settlements because the settling party may still face liability to the non-settling defendant for contribution. The deterrent effect on settlements, however, is far from clearly established. . . .

* * *

> Assuming, ***arguendo,*** that rejecting the settlement bar rule has a ***slight*** disincentive effect on settlements, we nevertheless authorize an action for contribution. ***Slip Op.*** at 2120 (emphasis added).

This comment reflects the panel's detachment from the practical ramifications of its decision and an acute insensitivity toward the interests of maritime tort victims. To maritime tort victims such as the widow of Danny Self, settling with at least one of the tortfeasors often offers the only hope of recovering from their tragedy and continuing the litigation against the intransigent non-settling tortfeasor. Unable to settle, a victim or his survivors may end in financial ruin while enduring decades of litigation between the tortfeasors. ***Self's*** adoption of the settlement bar rule appropriately took this reality into account. As ***Self*** correctly recognized, its decision was mandated by the Jones Act and general maritime law whose primary purpose is "to provide quick and full compensation to the injured seaman." ***Self,*** 832 F.2d at 1548.

The panel, however, sacrificed the tort victims' interest in obtaining timely relief, in pursuit its "quest for a just and equitable allocation of damages among tortfeasors." ***Slip Op.*** at 2119. The panel reasoned that absent a right of contribution, plaintiffs may reach irresponsible settlements with the one of the tortfeasors with the result that the non-settling tortfeasors will be "forced to pay for more than their proportionate share of the damages." ***Id.*** It found it intolerable that under ***Self's pro tanto*** settlement bar rule, "[i]t will be the non-settling defendants, not the plaintiff or the settling defendant,

who bear the risk that the plaintiff settled for too little." *Id.* at 2120.

The panel's concerns for the interests of non-settling tortfeasors are clearly unfounded. First, under the ***pro tanto*** settlement bar rule, a settlement which in disproportionately low will not go unchecked. If the settlement does not fairly represent the settling tortfeasor's potential liability, it will be subject to collateral attack by the non-settling tortfeasor and may be set aside by the court as collusive and in bad faith. ***Miller,*** 887 F.2d at 907.[2] Moreover, in a case involving seamen, settlements must be approved by the court, as they were in this case. It is clear therefore that non-settling defendants are adequately protected against disproportionately low or collusive settlements between the plaintiff and the settling defendant. *Id.*

In all events, the approach of allowing contribution against settling tortfeasors has been proven an ineffective tool in preventing irresponsible settlements between the plaintiffs and settling tortfeasors. In abandoning the 1939 version of the UCATA, the drafters noted:

> The idea underlying the 1939 provision was that the plaintiff should not be permitted to release one tortfeasor from his fare [sic] share of liability and mulct another instead, from motives of sympathy or spite, or because it might be

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[2] In *Miller,* 887 F.2d at 907, the Ninth Circuit barred one settling tortfeasor's contribution claim against another after examining the settling tortfeasor's settlement amount in light of his potential liability to plaintiff and concluded that "the settlement between the plaintiff and the [settling tortfeasor] was in good faith because it was not disproportionate to [his] liability."

> easier to collect from one than from the other; and that the release from contribution affords too much opportunity for collusion between the plaintiff and the released tortfeasor against the one not released. Reports from the state where the Act is adopted appear to agree that it has accomplished nothing in preventing collusion. In most three party cases two parties join hands against the third, and this occurs even when the case goes to trial against both defendants . . . If the plaintiff wishes to discriminate as to the defendants, the 1939 provision does not prevent him from doing so . . . It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit.

12 U.L.A. 99-100, ***quoted in, Miller,*** 887 F.2d at 907.

Proceeding from the premise that only a good faith settlement bars contribution, the ***pro tanto*** settlement bar rule of ***Self*** places the risk or wisdom of settling versus going to trial on the tortfeasors rather than the innocent victim. The tortfeasor who settles with the plaintiff considers the amount for which he settles to be less than his exposure at trial plus the additional cost of litigation. ***See, Leger,*** 592 F.2d at 1250. The non-settling tortfeasor, on the other hand, knows that he will receive a credit for the settling tortfeasor's payment to the plaintiff. If that amount turns out to be higher than the settling tortfeasor's share of the damages, the non-settling tortfeasor will benefit by paying less than its share. Indeed, he could pay nothing if the settlement amount exceeds the plaintiff's damage award at trial. Conversely,

the non-settling tortfeasor will pay more than its proportionate share if he miscalculates and receives an unfavorable verdict at trial. In either event, the plaintiff ultimately recovers the full measure of his damages, while his ability to settle with at least one tortfeasor remains unencumbered.

This result is entirely consistent with Supreme Court precedent. In ***Edmonds v. Compagnie Generale Transatlantique,*** 443 U.S. 252, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), the Supreme Court made it clear that allocating liability among joint tortfeasors based on their comparative fault is not justified where it would hinder the tort victim's full and efficient recovery. In ***Edmonds,*** one of the tortfeasors was immune from liability by virtue of the exclusive remedy provisions of the Longshoremen and Harbor Workers Compensation Act (LHWCA), 33 U.S.C.A. § 901, ***et seq.*** The Court held that the other tortfeasor was liable for all of the plaintiff's damages – even though he was only 20% at fault ***and could not seek contribution from the immune tortfeasor.*** The Court reasoned that the inequities engendered by its decision were justified to assure the tort victim's full recovery. ***Id.*** 99 S.Ct. at 2761.

The panel is alone among the circuits in concluding that the Supreme Court's decision in ***United States v. Reliable Transfer Co.,*** 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) mandates exaltation of the comparative fault rule at the expense of the litigants' ability to settle and the tort victim's prospects of obtaining timely relief. ***See, Miller,*** 887 F.2d at 904 (***Reliable Transfer*** is inapposite because it does not take into account the policy of promoting settlements that the settlement bar rule

is designed to advance). The only direct support presented by the panel for its position is the dicta in ***Donovan v. Robbins,*** 752 F.2d 1170 (7th Cir. 1985), an ERISA case, which the Seventh Circuit declined to follow in its recent maritime decision in the ***Matter of Oil Spill By the Amoco Cadiz,*** 954 F.2d 1279, 1316 (7th Cir. 1992).

In sum, the panel's adoption of the rule allowing contribution against settling tortfeasors represents a dramatic departure from the established law of this Circuit, on a course which no other circuit has elected to follow. The panel felt entitled to decide this issue according to its own preference after characterizing ***Self's*** adoption of the settlement bar rule as dicta. We will not engage in a technical analysis of why the issue of the settlement bar rule was properly before the Court in ***Self.*** Suffice it to say, however, that ***Self's*** adherence to the settlement bar rule was unequivocal. ***Self*** adopted the settlement bar rule after reasoned analysis and in the context of the issues before it. The public in this jurisdiction has placed its reliance on ***Self*** to assume that settlement relieves a settling tortfeasor from further litigation and liability. Indeed, every other court in this country that has been confronted with this issue has considered ***Self*** to represent the binding law of the Eleventh Circuit. To those litigants who have settled in reliance on ***Self,*** it is irrelevant that contribution was not addressed by the district court or the parties' briefs. To them, the panel's action means the devastating prospect of continued litigation and the realization that this Court does not always mean what it says.

As aptly noted by Professor Moore in 1B Moore's Federal Practice § 0.402[2] at P.44:

> [W]hen the appellate court has revealed the direction of its logic by going beyond the precise facts before it to discuss the application of a broader principle what it says . . . stands in the meanwhile as an expression of the court's understanding of the applicable principles . . .

Thus, regardless of the panel's technical characterization of *Self* as ***dicta,*** the justifiable reliance place upon it by the litigants in this jurisdiction cautions against its casual rejection and warrants the full attention of the Court ***en banc.*** This point was best expressed by this Court in its very first opinion in ***Bonner v. City of Prichard, Ala.,*** 661 F.2d 1206, 1209 (11th Cir. 1981):

> Stability and predictability are essential factors in the proper operation of the rule of law . . . [T]he reasons for following past decisions . . . are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication of by eliminating the need to litigate every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Id. at 1209; ***quoting, Moragne v. States Marine Lines, Inc.,*** 398 U.S. 375, 403, 90 S.Ct. 1772, 1789, 26 L.Ed.2d 339 (1970). This Court further noted:

> We tend to think of ***stare decisis*** as "it is decided." The full phrase is ***stare decisis et non quieta movere*** – 'to adhere to precedents and ***not to unsettle things which are established.***' The prospect of decades of writing on a clean slate in pursuit of the possibility that in some

> case or cases we might find a rule we like better . . . is at best unappealing, at worst disastrous.

Id. at 1211. The panel's decision contravenes prior law of this Circuit, and insofar as it establishes a precedent of grave consequence to the public, it involves a question of exceptional importance. *Id.* It should therefore be reconsidered by the Court ***en banc.***

CONCLUSION

For the foregoing reasons, Chevron respectfully requests ***en banc*** rehearing of the panel's decision.

Respectfully submitted,

KELLEY DRYE & WARREN
Attorneys for Chevron
Shipping Company
and Chevron Transport Corp.
2400 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 372-2400

By: /s/ B. Boghraty
Babak Boghraty
Florida Bar No. 840890

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct of the foregoing was mailed this 13th day of May, 1992 to DEWEY R. VILLAREAL, JR., ESQ., Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., P.O. Box 1438, Tampa, Florida 33601; ALAN B. VLCEK, ESQ., Sullivan & Vlcek, 12-14 East Bay Street, Suite 3100, Jacksonville, Florida 32202; COURTNEY WILDER STANTON, ESQ., 421 W. Church Street, #212-B, Jacksonville, Florida 32202 and JOHN FUTRELL, ESQ., Faris Ellis Cutrone & Gilmore, 1207 Whitney Building, 228 St. Charles Avenue, New Orleans, Louisiana 70130.

KELLEY DRYE & WARREN

By: /s/ B. Boghraty
Babak Boghraty

SA.6

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May 13, 1992

VIA FEDERAL EXPRESS

Honorable Miguel J. Cortez, Jr.
Clerk of the Circuit Court of Appeals
for the Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, Georgia 30303

Re: Great Lakes Dredge & Dock Company v. Chevron Shipping Co., et al.

Dear Mr. Cortez:

Pursuant to the Federal Rule of Appellate Procedure 28(j), Chevron Shipping Company hereby submits this

letter of supplemental authority in the above-styled Appeal. Please note that this letter relates to Chevron's Suggestion of Rehearing En Banc filed on May 14, 1992 and should be distributed to all Judges of the Circuit.

The United States Court of Appeals for the Fifth Circuit recently addressed the availability of contribution among two settling tortfeasors in *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. Jan. 1992). The issue in *Hardy* was virtually identical to that presented on this appeal; namely, whether a tortfeasor who has settled with the plaintiff after trial may sue another tortfeasor who settled with the plaintiff before trial for contribution on the ground that his settlement payment to the plaintiff exceeds his proportionate liability.

The Fifth Circuit held that a settling tortfeasor's contribution claim against another settling tortfeasor is barred for two reasons: (1) because a settling tortfeasor is immune from liability for contribution by virtue of his settlement with the plaintiff; and (2) a tortfeasor who settles is bound by the finality of his settlement and may not sue another tortfeasor for contribution. Id. at 835-36. The Court's reasoning and the language of the opinion supports Chevron's position throughout its Suggestion of Rehearing *en banc* that the rule adopted by the panel's will have grave consequences for litigants in this Circuit and has been castigated by all other circuits which have addressed this issue.

Very truly yours,

KELLEY DRYE & WARREN

/s/ B. Boghraty

cc: All Counsel of Record

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-3466

GREAT LAKES DREDGE &
DOCK COMPANY,

Plaintiff/Appellant,

vs.

CHEVRON SHIPPING COMPANY,
et al.,

Defendant/Appellees.
_____/

MOTION FOR STAY OF MANDATE

Appellees, CHEVRON SHIPPING COMPANY et al., (hereinafter "CHEVRON") by and through its undersigned attorneys, and pursuant to the Federal Rule of Appellate Procedure 41(b), hereby moves for a stay of the mandate in the above styled appeal, and as grounds therefore, states as follows:

1. CHEVRON filed its Suggestion of Rehearing *En Banc* from this Court's opinion on May 14, 1992.

2. In an Order dated June 23, 1992, this Court denied CHEVRON's Suggestion of Rehearing *En Banc.*

3. The panel's opinion, which holds that a settling tortfeasor may seek contribution against another settling tortfeasor in admiralty, creates a conflict on this issue with other Federal Courts of Appeal.

4. Based on the above, and pursuant to Rule of the Supreme Court of the United States 10(a), the undersigned has commenced preparing a Petition for Writ of Certiorari, which shall be filed pursuant to the applicable Rules of the Supreme Court and F.R.A.P. 41(b).

WHEREFORE, CHEVRON seeks an Order staying the mandate pending CHEVRON's Application for Certiorari and the Supreme Court's disposition of that application.

Respectfully submitted,

KELLEY DRYE & WARREN
Attorney for Appellee/Chevron
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Telephone: 305/372-2400
By: B. Boghraty
Babak Boghraty
(Florida Bar No. 840890)

SA.8

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 90-3466

GREAT LAKES DREDGE &
DOCK COMPANY,

Plaintiff/Appellant,

vs.

CHEVRON SHIPPING COMPANY,
et al.,

Defendant/Appellees.
_____/

MOTION FOR RECONSIDERATION OF DENIAL OF APPELLEE'S MOTION FOR STAY OF ISSUANCE OF MANDATE

Appellee, CHEVRON SHIPPING COMPANY, et al., ("Chevron") by and through its undersigned attorneys, and pursuant to Federal Rule of Appellate Procedure 41 and the Eleventh Circuit Appellate Rule 41-1, hereby requests the Court to reconsider its Order denying Chevron's Motion for Stay of Mandate, filed with the Clerk on July 14, 1992. In support of this motion, Chevron submits the following memorandum of law.

MEMORANDUM OF LAW

On June 23, 1992, this Court entered an Order denying Chevron's motion for rehearing from the Court's April 16, 1992 opinion. Thereafter, pursuant to Federal Rule of Appellate Procedure 41, Chevron filed a timely motion for a stay of the mandate pending the filing of

Chevron's petition for writ of certiorari to the United States Supreme Court. A copy of that motion for stay of mandate is attached. No opposition was ever filed; the motion was denied on July 14, 1992.

Chevron is in the process of preparing its petition for writ of certiorari to the Supreme Court. Rule 13.4 of the Supreme Court Rules requires that the petition be submitted no later than September 21, 1992. . . .

* * *

SA.9

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September 17, 1992

Courtney Wilder Stanton, Esq.
421 West Church Street, Suite 212 B
Jacksonville, Florida 32202

Re: Great Lakes Dredge & Dock Co. v.
Chevron Shipping Co., et al.

Dear Mr. Stanton:

We are in receipt of your correspondence of September 11, 1992 wherein you suggest that our Petition for a Writ of Certiorari to the United States Supreme Court is untimely and indicate that Great Lakes Dredge & Dock

Company will seek sanctions against Chevron should it be required to respond to our petition.

While you are welcome to file a motion for sanctions or any other motion you deem appropriate with the United States Supreme Court, we would draw your attention to Rule 35-6 of the Rules of the United States Court of Appeals for the Eleventh Circuit which states:

> "A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel."

We would further direct your attention to the Eleventh Circuit's June 23, 1992 order which expressly denies both Chevron's motion for rehearing and motion for rehearing en banc. Finally, we suggest that you contact the appellate docket clerk at the United States Supreme Court who most assuredly will confirm for your, as she did for us earlier this summer, that the operational effect of the Eleventh Circuit's rules and the June 23, 1992 order is to start the 90-day time frame in which a petition for writ of certiorari should be filed on June 23, 1992.

Very truly yours,

KELLEY DRYE & WARREN

/s/ Henry H. Bolz
Henry H. Bolz III

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* * *

11th Cir. R.35-6 Form of Suggestion. A suggestion of en banc consideration shall be bound in a white cover which is clearly labeled with the title "Suggestion of Rehearing (or Hearing) En Banc". A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel. A petition for rehearing will not be treated as a suggestion of rehearing en banc. A suggestion of en banc consideration shall contain the following items in this sequence:

(a) a cover page as described in 11th Cir. R.28-2(a);

(b) a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules;

(c) where the party suggesting en banc consideration is represented by counsel, one or both of the following statements of counsel as applicable:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases]

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or

more questions of exceptional importance: [set forth each question in one sentence]

/s/ _____

ATTORNEY OF RECORD FOR

_____

(d) table of contents and citations;

(e) statement of the issue(s) asserted to merit en banc consideration;

(f) statement of the course of proceedings and disposition of the case;

(g) statement of any facts necessary to argument of the issues;

(h) argument and authorities. These shall concern only the issues and shall address specifically not only their merit but why they are contended to be worthy of en banc consideration;

(i) conclusion;

(j) certificate of service.

* * *

11th Cir. R. 35-8 Length. A suggestion of en banc consideration shall not exceed 15 pages, and if made with a petition for rehearing (whether or not they are combined in a single document) the combined documents shall not exceed 15 pages.

* * *

I.O.P. – Suggestions of Rehearing En Banc

1. Time and Form – A suggestion of rehearing en banc whether or not combined with a petition for rehearing is timely only if received by the clerk within 21 days of entry of judgment. Judgment is entered on the opinion filing date. Typewritten suggestions of rehearing en banc in the form prescribed by FRAP Rule 32(a) are acceptable, and printing delays are not therefore considered a basis for requesting an extension of time.

2. Length – A suggestion of rehearing en banc, whether or not filed with a petition for rehearing, is limited to 15 pages, exclusive of items required by Cir. R. 35-6(a), (b), (c), (d), and (j).

. . . .

3. Handling of En Banc Suggestion by the judges –

a. Panel Has Control – Although a copy of the suggestion of rehearing en banc is distributed to each panel judge and every active judge of the court, the filing of a suggestion of rehearing en banc does not take the case out of plenary control of the panel deciding the case. The panel may, on its own, grant rehearing by the panel and may do so without action by the full court. Rehearing en banc may only be granted by affirmative vote of a majority of circuit judges in regular active service, as hereinafter provided.

b. Requesting a Poll – Within 10 days of the date of mailing to the judge by the clerk, any active Eleventh Circuit judge may notify the writing judge (the senior active Eleventh Circuit judge on the panel if the writing judge is a non-active member) that the judge desires the case be reheard en banc. At the same time the judge may notify the clerk to withhold the

mandate. This is also notice that in the event the panel declines to grant rehearing an en banc poll is desired.

If the panel, after such notice, concludes not to grant the rehearing it notifies the chief judge of that fact and the chief judge then polls the court by written ballot on whether rehearing en banc should be granted.

* * *

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SAMPLE SETTLEMENT DOCUMENT LANGUAGE*

We specifically reserve at this time any rights we might have arising out of the subject matter of this Release against any parties other than the Released Parties, including without limitation Hawkins Sandblasting, Inc., (hereinafter "Other Parties"). We specifically agree, however, that if we ever assert any claim against any such Other Parties, the claims against such Other Parties will only be for the portion of damages for which such Other Parties might be responsible as a result of the proportionate negligence or other fault of those Other Parties, and we agree that we shall not be entitled to assert any claim against any such Other Parties for any portion of claimed damages which in any way result from any claimed negligence or fault on behalf of the Released Parties. We specifically agree that we will assert no claim against any such Other Parties which would give said Other Parties any right of contribution against the Released Parties or any of them. We further agree to advise any such Other Parties of this settlement and to provide such Other Parties with a copy of this release and indemnity agreement. We also agree to notify the Released Parties immediately of any assertion by us of any claim against any such Other Parties.

---

* *Gregory C. English, et ux. v. Jacksonville Shipyards, Inc.*, Fla. 4th Cir., Civil Action 89-22206, Div. CV-L, settlement bound February 21, 1992.